Supreme Court, U.S.
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In the Supreme Court of the United States

NEW CINGULAR WIRELESS SERVICES, INC.,
F/K/A AT&T WIRELESS SERVICES, INC., AND
NEW CINGULAR WIRELESS PCS, LLC,

Petitioners,

v.

PORSHA MEOLI, LESLIE ARMSTRONG, SRIDHAR KRISHNAN,
WENDY LOWINGER, JERILYN MARLOWE,
ALAN CHERRIGAN, AND JAEL SALAS,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Five

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents the same questions that are presented in *Cingular Wireless LLC v. Mendoza*, No. 05-1119. They are:

1. Whether the Federal Arbitration Act preempts a state-law rule conditioning the enforcement of an arbitration provision on the defendant's amenability to class arbitration.

2. Whether the Federal Arbitration Act preempts a state-law rule that claims seeking injunctions on behalf of the general public are non-arbitrable.

RULE 14.1(b) STATEMENT

In addition to the parties listed in the caption, Diane Tucker was a party to the proceedings in the Court of Appeal. Although she is not now and never has been a customer of AT&T Wireless Services, Inc., Tucker filed a complaint against AT&T Wireless seeking relief on behalf of AT&T Wireless customers. AT&T Wireless moved to compel her to arbitrate on the ground that the customers whom she purports to represent are subject to binding arbitration provisions. The Court of Appeal held that she is not required to arbitrate because she never personally entered into an arbitration agreement with AT&T Wireless. AT&T Wireless has elected not to seek review of that decision, and accordingly Tucker is not a party to this petition.

AT&T Wireless Services PCS, LLC; Bay Area Cellular Telephone Company; and Cellular Telephone Company were all named as co-defendants below in the various complaints, and were appellants in the Court of Appeal. Bay Area Cellular Telephone Company is a terminated California general partnership to which petitioner New Cingular Wireless PCS, LLC is a successor. AT&T Wireless Services PCS, LLC merged into AT&T Wireless PCS, LLC, which is now known as New Cingular Wireless PCS, LLC. Cellular Telephone Company is a terminated New York general partnership.

CORPORATE DISCLOSURE STATEMENT

Petitioners New Cingular Wireless Services, Inc. (formerly known as AT&T Wireless Services, Inc.) and New Cingular Wireless PCS, LLC are wholly owned by Cingular Wireless LLC or its wholly-owned subsidiaries. Cingular Wireless LLC has no parent company. It is indirectly owned by AT&T Inc. (the result of the acquisition of AT&T Corp. by SBC Communications, Inc.) and BellSouth Corporation, which are the only publicly held corporations with a 10% or more ownership interest in Cingular Wireless LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners New Cingular Wireless Services, Inc. (formerly known as AT&T Wireless Services, Inc.) and New Cingular Wireless PCS, LLC respectfully petition for a writ of certiorari to review the judgment of the Court of Appeal of the State of California.[1]

OPINIONS BELOW

The Court of Appeal's opinion after transfer (App., *infra*, 1a-14a) is unreported. The order of the California Supreme Court denying review (App., *infra*, 15a) is unreported. The order of the Superior Court denying AT&T Wireless's motion to compel arbitration (App., *infra*, 16a-28a) is unreported. The original decision of the Court of Appeal affirming in part and reversing in part the Superior Court's order (App., *infra*, 29a-50a) is unreported. The order of the California Supreme Court granting review of the Court of Appeal's original decision and instructing the Court of Appeal to reconsider its decision (App., *infra*, 51a-52a) is unreported.

JURISDICTION

The judgment of the Court of Appeal was entered on September 30, 2005. The California Supreme Court denied AT&T Wireless's timely filed petition for review on December 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. Although the Court of Appeal's judgment affirming the denial of AT&T Wireless's motion to compel arbitration is interlocutory, this Court has jurisdiction to review such judgments. See, *e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984); *Perry v. Thomas*, 482 U.S. 483, 489 n.7 (1987); see also *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (granting certiorari and reversing interlocutory ruling refusing to enforce arbitration provision without address-

[1] We will refer to petitioners collectively as AT&T Wireless.

ing jurisdiction); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (same); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (same).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2 (the Supremacy Clause) of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.

STATEMENT

Petitioner AT&T Wireless is now part of Cingular Wireless LLC, which is the nation's largest wireless service provider, with over 50 million customers, several million of whom are California residents. When AT&T Wireless's customers obtained wireless service, they entered into standard wireless service agreements that contained arbitration provisions.

Notwithstanding their agreements to arbitrate, respondents collectively filed four class and representative actions against AT&T Wireless, asserting claims for restitution and injunctive relief pursuant to California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200 *et seq.*),

California Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code § 1750 *et seq.*), and California Civil Code Section 1671. All of these lawsuits, which are among several coordinated actions now pending in the Alameda County Superior Court, challenge the termination-fee provisions of AT&T Wireless's subscriber agreements. In addition, several of the respondents attack AT&T Wireless's alleged practice of programming its handsets so that they would work only on AT&T Wireless's network. App., *infra*, 2a, 4a.

AT&T Wireless moved to stay proceedings and compel arbitration of respondents' claims on the ground that respondents are bound by arbitration provisions contained in their agreements with AT&T Wireless. The Alameda County Superior Court nonetheless denied the motion to compel arbitration, holding that under controlling California precedent AT&T Wireless's arbitration provision is unconscionable because it prohibits class and representative actions. App., *infra*, 22a-28a. The court also concluded that respondents' claims for public injunctive relief under the CLRA and UCL are non-arbitrable under, respectively, *Broughton v. Cigna Healthplans of California*, 988 P.2d 67 (Cal. 1999) (CLRA), and *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (Cal. 2003) (UCL). App., *infra*, 16a-21a. See also 05-1119 Pet. at 4-5.

The Court of Appeal reversed in part and affirmed in part, holding that the prohibition of class arbitration is not unconscionable, but that respondents' claims for public injunctive relief are non-arbitrable. App., *infra*, 33a, 37a-50a. Both sides petitioned for review. The California Supreme Court then granted review and transferred the case back to the Court of Appeal with instructions to vacate its opinion and reconsider in light of *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). App., *infra*, 51a.

In *Discover Bank*, the California Supreme Court held that class-action waivers are substantively unconscionable "when the waiver is found in a consumer contract of adhesion in a

setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." 113 P.3d at 1110. As set forth more fully in our petition for certiorari in *Mendoza*, the court also rejected several arguments raised by Discover Bank and its amici that the FAA preempted its unconscionability holding. See 05-1119 Pet. at 5-6.

After receiving supplemental briefs, the Court of Appeal filed a new opinion on September 30, 2005. As in its initial opinion, the court held that, under *Broughton* and *Cruz*, respondents' claims for public injunctive relief are non-arbitrable. App., *infra*, 4a-5a. Over AT&T Wireless's preemption arguments, the court then proceeded to hold that, under *Discover Bank*, the prohibition against class arbitration in AT&T Wireless's arbitration provision is substantively unconscionable because (i) it is found in a contract of adhesion, (ii) respondents' claims are small, and (iii) respondents allege that AT&T Wireless engaged in unlawful practices. *Id.* at 9a-14a.

AT&T Wireless filed a petition for review in the California Supreme Court arguing that (i) the Court of Appeal had misconstrued *Discover Bank*; (ii) the FAA preempts the Court of Appeal's holding that AT&T Wireless's prohibition against class arbitration is unconscionable; and (iii) *Broughton* and *Cruz* cannot be squared with this Court's precedents and should be overruled. The California Supreme Court denied review on December 14, 2005, without comment. App., *infra*, 15a.

REASONS FOR GRANTING THE PETITION

The issues presented in this case are identical to the ones presented in *Cingular Wireless LLC v. Mendoza*, No. 05-1119. First, the petition raises the question left open by this Court in *Southland Corp. v. Keating*, 465 U.S. 1 (1984): whether the FAA preempts a state-law rule conditioning the enforcement of an arbitration provision on the defendant's amenability to class arbitration. Second, the petition presents the question whether the FAA preempts a state-law rule that claims for injunctions that would benefit the general public are non-arbitrable.

Both of these questions were answered in the negative by the courts of California. Together, these two holdings threaten to be the death knell for tens of millions of arbitration agreements in California.

In our petition for a writ of certiorari in *Mendoza*, we submit that (1) there is a conflict between the courts of California and other state and federal courts on each of the questions presented; (2) the issues presented are of great importance and warrant this Court's review; and (3) the California courts are on the wrong side of each issue.[2] Those arguments apply with equal force here.

Because the issues presented in this case are the same as those presented in *Mendoza*, the outcome of *Mendoza* should determine the outcome here. Accordingly, it would be appropriate for the Court to hold this case pending the disposition of the petition for a writ of certiorari in *Mendoza*.

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[2] We are supplying respondents' counsel with a copy of our petition in *Mendoza*.

CONCLUSION

The petition for a writ of certiorari should be held for disposition in light of *Cingular Wireless LLC v. Mendoza*, No. 05-1119.

Respectfully submitted.

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APPENDIX